

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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BOARD OF TRUSTEES OF THE
CONSTRUCTION INDUSTRY AND
LABORERS HEALTH AND WELFARE
TRUST, et al.,

Case No.2:23-CV-830 JCM (DJA)

ORDER

Plaintiff(s),

v.

BOTTOM LINE CONSTRUCTION,

Defendant(s).

Presently before the court is the plaintiffs’¹ Rule 55(b)(2) motion for default judgment against the defendant, Bottom Line Construction. (ECF No. 7). The court clerk entered default judgment on the plaintiffs’ motion. (ECF No. 8). For the reasons stated below, the court vacates the clerk’s entry of default judgment and grants the plaintiffs’ motion for default judgment.

I. Background

This action arises under the Employment Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. §§ 1001 to 1500. (ECF No. 1). The plaintiffs are trust fund entities and defendant Bottom Line Construction is an employer that entered into a collective bargaining agreement (“CBA”) with Construction Industry and Laborer’s Union Local 872. (*Id.* at 2). The CBA, trust agreements, and 29 U.S.C. § 1145 require Bottom Line, as an employer, to make timely contributions to the trust funds on behalf of each employee who performs work covered by the

¹ Board of Trustees of the Construction Industry and Laborers Health and Welfare Trust, Board of Trustees of the Construction Industry and Laborers Joint Pension Trust, Board of Trustees of the Construction Industry and Laborers Vacation Trust, and Board of Trustees of the Southern Nevada Laborers Local 872 Training Trust.

1 CBA. (*See generally id.*). The plaintiffs bring a sole claim against Bottom Line—ERISA
 2 delinquent contributions for Bottom Line’s failure to remit employee benefit contributions to the
 3 trust funds. (*Id.*).

4 The plaintiffs served Bottom Line on June 11, 2023. (ECF No. 4). Bottom Line did not
 5 answer or otherwise appear, and the plaintiffs moved for entry of clerk’s default. (ECF No. 5).
 6 The clerk entered default on August 2, 2023. (ECF No. 6). Thereafter, the plaintiffs moved this
 7 court for default judgment under Federal Rule of Civil Procedure 55(b)(2), requesting the
 8 delinquent contributions, interest, liquidated damages, audit fees, reasonable attorney’s fees, and
 9 attorney’s fees to cover the future costs of collection. (ECF No. 7). Even though the plaintiffs’
 10 motion was made under Rule 55(b)(2) (*court’s* entry of default judgment) and requested a damages
 11 amount not for sum certain, the clerk entered default judgment. (ECF No. 8). The court therefore
 12 vacates the clerk’s entry of default judgment and discusses the merits of plaintiffs’ motion for
 13 default judgment below.

14 **II. Clerk’s Default Judgment**

15 Rule 55(b)(1) allows the clerk to enter default judgment “*on the plaintiff’s request*,” if the
 16 plaintiff’s “claim is for sum certain or a sum that can be made certain by computation.” FED. R.
 17 CIV. P. 55(b)(1) (emphasis added). “*In all other cases*, the party *must* apply to the court for a
 18 default judgment.” FED. R. CIV. P. 55(b)(2) (emphasis added). There are thus at least two
 19 impediments to the clerk entering default judgment in this case—first, the plaintiffs did not request
 20 a clerk’s entry of default and second, the requested relief was not for sum certain.

21 The plain language of Rule 55(b)(1) limits clerks’ entries of default judgment to instances
 22 where it is requested by the plaintiff. This court’s local rules also limit the clerk’s ability to enter
 23 default judgment to “the circumstances authorized by Fed. R. Civ. P. 55(b)(1),” and does not
 24 provide that clerks may enter default judgment under Rule 55(b)(2). LR 77-1. In this case, the
 25 plaintiffs’ motion for default judgment cites Rule 55(b)(2) only and does not request a clerk’s entry
 26 of default judgment. (ECF No. 7).

27 . . .

28 . . .

1 It is also generally accepted² that, under the sum certain rule, a request for “reasonable”
 2 attorney’s fees “prevents the clerk from entering a judgment under Rule 55(b)(1)” because what is
 3 “reasonable” must be decided by the court. 10A Wright & Miller, Federal Practice and Procedure
 4 § 2683 (4th ed. 2024). Rule 55 “carefully limits the clerk’s authority to those cases where entry of
 5 judgment is purely a ministerial act, since sound policy dictates that the clerk should not be
 6 invested with discretionary power.” *Combs*, 105 F.R.D. at 474 (cleaned up) (citations omitted).
 7 ERISA allows the court to award “reasonable attorney’s fees and costs,” 29 U.S.C. § 1132(g)(2)
 8 (emphasis added), and the reasonableness of fees is a “judgment call which only the court can
 9 make.” *Combs*, 105 F.R.D. at 475. The clerk was therefore without authority to enter default
 10 judgment in this case.

11 Rule 60(b) allows a court to “relieve a party . . . from a final judgment . . . for mistake,
 12 inadvertence, surprise, or excusable neglect;” if “the judgment is void;” or for “any other reason
 13 that justifies relief.” The Ninth Circuit has explained that, although Rule 60(b) states that a judge
 14 may vacate a judgment “on motion,” it does not state “whether the motion must be by a party or
 15 can be *sua sponte*.” *Kingviion Pay-Per-View v. Lake Alice Bar*, 168 F.3d 347, 351 (9th Cir. 1999).
 16 The court therefore construed Rule 60(b) as allowing the district court to vacate a judgment on its
 17 own motion because allowing a “judge to repair mistakes in default judgments more than ten days
 18 old, in the fortunate circumstances where the judge happens to notice them” serves the interests of
 19 justice. *Id.* at 352.

20 But the Ninth Circuit also held that if the court reduces the judgment award, the party in
 21 whose favor judgment was entered must be given notice and an opportunity to be heard as a
 22 “judgment is property, so taking it away requires due process of law.” *Id.* As this court is not
 23 reducing the judgment amount in this case,³ it finds that there are no due process concerns here.
 24 Accordingly, for the reasons set forth above, the clerk’s entry of default judgment (ECF No. 8) is

26 ² *E.g.*, *Combs v. Coal & Min. Mgmt. Servs., Inc.*, 105 F.R.D. 472, 475 (D.D.C. 1984) (citing
 27 cases); *Branded Online Inc. v. Holden LLC*, No. SACV150390DOCDFMX, 2016 WL 8849024,
 28 at *1 (C.D. Cal. Jan. 8, 2016); *Phillips 66 v. Grainer*, No. 1:13-cv-1890-LJO-BAM, 2015 WL
 3797396, at *2 (E.D. Cal. June 18, 2015).

³ See *infra* Section III.B.2.

1 vacated under Rule 60(b).

2 **III. Motion for Default Judgment**

3 The plaintiffs request affirmative relief in the form of monetary damages and has properly
4 complied with the requirements for entry of a default judgment by first applying for—and
5 obtaining—a clerk’s entry of default under Rule 55(a), and then moving for entry of a default
6 judgment under Rule 55(b)(2). The court may therefore consider the merits of their motion.

7 A. Legal Standard

8 Under Federal Rule of Civil Procedure 55(b), after the court clerk has entered default, the
9 party seeking affirmative relief may move for default judgment. *Eitel v. McCool*, 782 F.2d 1470,
10 1471 (9th Cir. 1986); *Aldabe v. Aldabe*, 616 F.3d 1089, 1092 (9th Cir. 1980). Default judgment
11 is appropriate “[w]hen a party against whom a judgment for affirmative relief is sought has failed
12 to plead or otherwise defend, and that failure is shown by affidavit or otherwise.” FED. R. CIV. P.
13 55(a). There is no right to the entry of default judgment, and the matter is committed to the district
14 court’s discretion. *See Draper v. Coombes*, 792 F.2d 915, 924 (9th Cir. 1986); *Aldabe*, 616 F.2d
15 at 1092.

16 When exercising its discretion to grant default judgment, the court considers seven factors:
17 (1) the possibility of prejudice to plaintiff if default judgment is not entered; (2) the merits of the
18 claims; (3) the sufficiency of the complaint; (4) the amount of money at stake; (5) the possibility
19 of a dispute concerning material facts; (6) whether default was due to excusable neglect; and (7)
20 the policy favoring a decision on the merits. *Eitel*, 782 F.2d at 1471–72. When applying the *Eitel*
21 factors, the factual allegations of the complaint, except those relating to the amount of damages,
22 are taken as true. *See Fair Housing of Marin v. Combs*, 285 F.3d 899, 906 (9th Cir. 2002); *Geddes*
23 *v. United Fin. Group*, 559 F.2d 557, 560 (9th Cir. 1977). “[D]efault judgments are more often
24 granted than denied.” *PepsiCo, Inc. v. Triunfo-Mex, Inc.*, 189 F.R.D. 431, 432 (C.D. Cal. 1999).

25 B. Discussion

26 *1. Entry of Default Judgment*

27 After considering the *Eitel* factors, the court finds that the plaintiffs are entitled to default
28 judgment. The first factor “considers whether the plaintiff will suffer prejudice if default judgment

1 is not entered.” *PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1177 (C.D. Cal. 2002).
 2 Given Bottom Line’s failure to appear in this lawsuit and the plaintiffs’ lack of alternative avenues
 3 of recovery, they will suffer prejudice if default judgment is not entered. This factor weighs in
 4 favor of default judgment.

5 Factors two and three also support default judgment. The complaint alleges a sole claim
 6 for relief—ERISA delinquent contributions under 29 U.S.C. § 1145. (ECF No. 1). “Every
 7 employer who is obligated to make contributions to a multiemployer plan under the terms of the
 8 plan . . . shall, to the extent not inconsistent with law, make such contributions . . .” 29 U.S.C. §
 9 1145. If the employer fails to do so, a plaintiff may bring an action under 29 U.S.C. § 1132 (d)(1)
 10 to recover the unpaid contributions.

11 The plaintiffs allege that Bottom Line has failed to meet its contribution obligations under
 12 both ERISA, the CBA, and the trust agreements. (*See generally* ECF No. 1). The plaintiffs’
 13 complaint thus states a claim upon which they may recover. *Danning v. Lavine*, 572 F.2d 1386,
 14 1388 (9th Cir. 1978) (explaining that a complaint is sufficient if it alleges a claim upon which the
 15 plaintiffs can recover). Furthermore, the plaintiffs’ claim is meritorious against Bottom Line
 16 because Bottom Line has admitted liability for the claim asserted in the complaint by defaulting.
 17 Thus, the plaintiffs’ allegations are also substantiated by the record before the court.

18 The fourth *Eitel* factor balances the sum of money at stake with the “seriousness of the
 19 action.” *Lehman Bros. Holdings Inc. v. Bayporte Enters., Inc.*, No. C 11-0961-CW, 2011 WL
 20 6141079, at *7 N.D. Cal. Oct. 7, 2011. “If the sum of money at issue is reasonably proportionate
 21 to the harm caused by the defendant’s actions, then default judgment is warranted.” *Landstar*
 22 *Ranger, Inc. v. Parth Enter., Inc.*, 725 F. Supp. 2d 916, 921 (N.D. Cal. 2010). The plaintiffs
 23 request approximately \$15,639 in damages. (ECF No. 7, at 11). This amount is dictated largely
 24 by ERISA and the CBA. As the complaint and factual record sufficiently support the plaintiffs’
 25 claimed damages, this factor favors entry of default judgment. *See Eitel*, 782 F.2d at 1471.

26 The sixth *Eitel* factor considers excusable neglect. 782 F.2d at 1472. This factor favors
 27 entry of default judgment when the defendant has been properly served or the plaintiff shows that
 28 the defendant is aware of the lawsuit and failed to answer. *Meadows v. Dominican Republic*, 817

1 F.2d 517, 521 (9th Cir. 1987). Bottom Line was properly served in this case but has failed to
 2 answer or otherwise appear. (ECF No. 3). Accordingly, the court finds that the plaintiffs have
 3 demonstrated that Bottom Line's failure to appear is not the result of excusable neglect. *See id.*

4 Finally, though there is a policy to decide cases "on the merits whenever reasonably
 5 possible," *Eitel*, 782 F.2d at 1472, it is not reasonably possible when the defendants fail to answer
 6 a complaint. "Thus, the preference to decide a case on the merits does not preclude a court from
 7 granting default judgment." *PepsiCo*, 238 F. Supp.2d at 1177. The *Eitel* factors overwhelmingly
 8 support entry of default judgment, and the court finds that default judgment in favor of the
 9 plaintiffs is warranted.

10 2. Requested Relief

11 Once liability is established by default judgment, the plaintiff must establish that the
 12 requested relief is appropriate. *See Geddes v. United Fin. Grp.*, 559 F.2d 557, 560 (9th Cir. 1977).
 13 In an action to recover delinquent ERISA contributions, the court may award the following:

14 (A) the unpaid contributions,

15 (B) interest on the unpaid contributions,

16 (C) an amount equal to the greater of—

17 (i) interest on the unpaid contributions, or

18 (ii) liquidated damages provided for under the plan in an amount not
 19 in excess of 20 percent (or such higher percentage as may be
 20 permitted under Federal or State law) of the amount determined by
 the court under subparagraph (A),

21 (D) reasonable attorney's fees and costs of the action, to be paid by
 the defendant, and

22 (E) such other legal or equitable relief as the court deems
 23 appropriate.

24 29 U.S.C. § 1132(g)(2). An award under section 1132(g)(2) is mandatory if: (1) the employer is
 25 delinquent at the time the action is filed; (2) the district court has entered a judgment against the
 26 employer; and (3) the plan provides for such an award. *Northwest Adm'rs, Inc. v. Albertson's, Inc.*,
 27 104 F.3d 253, 257 (9th Cir.1996) (citing *Idaho Plumbers and Pipefitters Health and Welfare Fund*
 28 *v. United Mechanical Contractors, Inc.*, 875 F.2d 212, 215–16 (9th Cir.1989)).

1 The plaintiffs seek a total of \$15,639 in damages. (ECF No. 7, at 13). This amount includes
 2 the delinquent contributions, interest, liquidated damages, audit fees, reasonable attorney's fees,
 3 and future attorney's fees. (*Id.*). The court finds that the plaintiffs are indeed entitled to an award
 4 under section 1132(g)(2) and the governing documents and discusses each of the requested awards
 5 in turn.

6 The plaintiffs seek \$2,124 in delinquent contributions for the period of August 16, 2021,
 7 to March 31, 2022. (ECF No. 7, at 5). The request is supported by Christopher M. Humes's
 8 declaration, and an audit conducted by an independent auditor. (ECF No. 7-1, at 5; Pls.' Ex 6,
 9 ECF No. 7-1, at 66).⁴ The court therefore awards the requested unpaid contributions in full.

10 The plaintiffs seek \$655 in interest and \$655 in liquidated damages. (ECF No. 7, at 5).
 11 The interest amount was calculated using a 14% annual rate from the date the contributions became
 12 delinquent to February 12, 2024 (the date the plaintiffs anticipated that it would receive judgment).
 13 (*Id.* at 5; Pls.' Ex. 6, ECF No. 7-1, at 66). The plaintiffs' calculation is consistent with the terms
 14 of the trust agreements, which specify that simple interest shall be awarded at the annual rate of
 15 14%. (Pls.' Ex. 3, *id.* at 35; Pls.' Ex. 4, *id.* at 47; Pls.' Ex. 5, *id.* at 59). This results in \$0.81 of
 16 interest accruing per day. The court also adds \$105.30⁵ in interest to account for the interest
 17 accrued from February 12, 2024, to the date of *this* judgment (June 21, 2024). This results in a
 18 new total interest amount of \$760.30.

19 Section 1132(g)(2)(C) instructs the court to award the greater of either the interest amount
 20 or 20% of delinquent contributions as liquidated damages. Because 20% of the delinquent
 21 contributions is less than the interest amount, the liquidated damages amount shall be \$760.30 (the
 22 interest). The court therefore finds that a total of \$1,520.60⁶ must be awarded as interest *and*
 23 liquidated damages.

24 ...

26 ⁴ The court reminds the plaintiffs that under LR IC 2-2(a)(3)(A), each exhibit must be
 27 attached as a separate file.

28 ⁵ There are 130 days between February 12, 2024, and June 21, 2024. $130 \times \$0.81 = \105.30 .

⁶ $\$760.30 + \$760.30 = \$1,520.60$

1 The plaintiffs seek \$1,765 to cover audit fees, \$5,440 in reasonable attorney's fees and
 2 costs, and an additional \$5,000 to cover the future expenses of execution. (ECF No. 7, at 6). The
 3 court finds that the requested audit fees and additional \$5,000 to cover future legal expenses are
 4 warranted under 29 U.S.C. § 1132(g)(2)(E) and supported by the governing documents and
 5 Humes's declaration. (ECF No. 7-1, at 5; Pls.' Ex. 2, *id.* at 9, 28).

6 Having prevailed in this action for unpaid and late contributions, the plaintiffs are also
 7 entitled to reasonable attorney's fees and costs. 29 U.S.C. § 1132(g)(2)(D). Reasonable attorney's
 8 fees are calculated via the "lodestar" method, which is obtained by multiplying the number of
 9 hours reasonably expended on litigation by a reasonable hourly rate. *Van Gerwen v. Guarantee*
 10 *Mutual Life Co.*, 214 F.3d 1041, 1045 (9th Cir.2000) (applying lodestar to an ERISA action). In
 11 calculating the lodestar number, the court must determine a reasonable rate and a reasonable
 12 number of hours for each attorney. *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th
 13 Cir.1986), *reh'g denied, amended on other grounds*, 808 F.2d 1373 (9th Cir.1987).

14 The Supreme Court has held that reasonable attorney's fees must "be calculated according
 15 to the prevailing market rates in the relevant community," considering the fees charged by
 16 "lawyers of reasonably comparable skill, experience, and reputation." *Blum v. Stenson*, 465 U.S.
 17 886, 895-96 n. 11 (1984). "The party seeking an award of fees should submit evidence supporting
 18 the hours worked and rates claimed . . . [w]here the documentation of hours is inadequate, the
 19 district court may reduce the award accordingly." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

20 The plaintiffs seek \$5,440 in reasonable attorney's fees for time spent drafting and filing
 21 the complaint and related documents (1.9 hours), preparing and filing the motion for default (1.3
 22 hours), preparing and filing the motion for default judgment and accompanying exhibits (11.3
 23 hours), and having various related inter- and intra-office communications (2.3 hours). (Pls.' Ex.
 24 8, ECF No. 7-1, at 78). Humes declares that he is an attorney at Brownstein Hyatt Farber Schreck,
 25 LLP, and the plaintiffs' attorney. (Humes Dec., ECF No. 7-1, at 5). He requests rates of \$330 to
 26 \$360 for attorneys and \$110 to \$220 for paralegals. (*Id.* at 4). He declares that these rates are
 27 "based on the discounted billing rates for [the firm's] Las Vegas employee benefits and ERISA
 28 practice." (*Id.*).

The court finds the number of hours expended, and the hourly rates, to be reasonable. The rates are in line with the prevailing rates for ERISA cases in this district.⁷ *E.g., Trustees of Operating Engineers Pension Tr. v. Diversified Concrete Cutting, Inc.*, No. 2:17-CV-2686-APG-GWF, 2018 WL 1996458, at *4 (D. Nev. Apr. 27, 2018). In summary, the court awards the plaintiffs the following damages against Bottom Line:

Delinquent Contributions	\$2,124
Interest	\$760.30
Liquidated Damages	\$760.30
Audit Fees	\$1,765
Reasonable Attorney's Fees	\$5,440
<u>Future Attorney's Fees</u>	<u>\$5,000</u>
Total:	\$15,849.60

IV. Conclusion

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the clerk's entry of default judgment (ECF No. 8) be, and the same hereby is, VACATED and STRICKEN from the docket.

IT IS FURTHER ORDERED that the plaintiffs' writ of execution (ECF No. 9) be, and the same hereby is, DENIED *without* prejudice.

IT IS FURTHER ORDERED that the plaintiffs' motion for default judgment (ECF No. 7) be, and the same hereby is, GRANTED, consistent with the foregoing.

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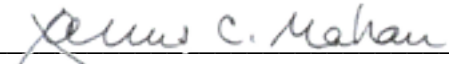
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⁷ However, the court reminds the plaintiffs' attorneys that it should provide the court with the "prevailing market rates in the relevant community" and information regarding the attorneys' "skill, experience, and reputation" when requesting reasonable fees. *Blum*, 465 U.S. at 895-96 n. 11.

1 Judgment is hereby entered in favor of the plaintiffs and against defendant Bottom Line
2 Construction in the amount of **\$15,849.60**. The full judgment amount of \$15,849.60 shall carry
3 interest at the statutory post-judgment rate until paid in full. The clerk is INSTRUCTED to enter
4 judgment accordingly.

5 DATED June 24, 2024.

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8 UNITED STATES DISTRICT JUDGE
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